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# Supreme Court of the United States

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OCTOBER TERM, 1942.

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No. 493.

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EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE  
INSURANCE DEPARTMENT OF THE STATE  
OF MISSOURI, PETITIONER,

VS.

CENTRAL SURETY AND INSURANCE CORPORATION,  
A CORPORATION, AND R. E. O'MALLEY,  
RESPONDENTS.

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BRIEF FOR R. E. O'MALLEY, RESPONDENT, IN  
OPPOSITION TO PETITION FOR  
CERTIORARI.

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**BRIEF FOR R. E. O'MALLEY, RESPONDENT, IN  
OPPOSITION TO PETITION FOR  
CERTIORARI.**

A.

## OPINIONS DELIVERED IN THE COURT BELOW.

The opinion of the Supreme Court of Missouri, *Lucas, Superintendent of Insurance Department, v. Manufacturing Lumbermen's Underwriters et al.* (not yet officially reported), is reported in 163 S. W. 2d 750, 761 (R. 1339-1358).

B.

**JURISDICTION.**

The jurisdiction of this Court is invoked by Petitioner under Section 237 of the Judicial Code (43 Stat. 937), 28 U. S. C. A., Sec. 344. The date of the judgment of the Supreme Court of Missouri sought to be reviewed was May 5, 1942 (R. 1339-1358). Motion for rehearing was overruled June 17, 1942 (R. 1403). Motion to transfer to the Court *en banc* was denied July 28, 1942 (R. 1472).

C.

**STATEMENT OF THE CASE.**

R. E. O'Malley, then Superintendent of the Missouri Insurance Department, on November 12, 1936, took charge of the affairs of Manufacturing Lumbermen's Underwriters, a reciprocal insurance exchange. (Respondent will hereafter refer to "Manufacturing Lumbermen's Underwriters" as "M. L. U.")

M. L. U. was organized and doing business under the provisions of Article 11 of Chapter 37, Revised Statutes of Missouri, 1939 (Sections 6078-6089, Revised Statutes of Missouri, 1939, inclusive), and having its principal office at Kansas City, Missouri. Rankin-Benedict Underwriting Company, a corporation, was attorney-in-fact for this exchange.

The proceeding was commenced against the exchange and its attorney-in-fact pursuant to provisions of Sections 6052 to 6069, Revised Statutes of Missouri, 1939, inclusive, and O'Malley was authorized by the Court, under Sec. 6057, R. S. Mo., 1939, to temporarily take charge of the exchange's property and receive its premiums and other income until final decree (R. 5). The proceeding was resisted vigorously. After a trial and on April 1, 1937, pursuant to the provisions of Secs. 6056 and 6058, R. S. Mo., 1939, a final decree was entered, dissolving the ex-

change and vesting title to its assets in fee simple in O'Malley, as Superintendent, for the use and benefit of the Exchange's creditors, subscribers and policyholders, and others interested (R. 38-40).

Later, on August 14, 1937, finding that the exchange could not be rehabilitated or reinsured, as authorized by Secs. 6059 to 6065, R. S. Mo., 1939, O'Malley, under Sec. 6061, R. S. Mo., 1939, applied for and the Court granted an order to liquidate the exchange.

O'Malley continued in charge until October 20, 1937, when he was succeeded by George A. S. Robertson as Superintendent. O'Malley's accounting covered the entire period he was in charge; that is, under the temporary order from November 12, 1936, to April 1, 1937; under the final decree from April 1, 1937, until order of liquidation, August 14, 1937, and from August 14, 1937, to October 20, 1937. During the time O'Malley was temporarily in charge, and prior to the final decree of dissolution on April 1, 1937, he attempted to maintain the *status quo* of the concern. Orders were obtained (R. 6, 7, 8), authorizing O'Malley to pay such ordinary expenses, including traveling expenses, postage, telegraph and telephone and usual operating expenses, as should be determined by said O'Malley.

Upon the filing of O'Malley's final accounting, exceptions were filed by Robertson, then Superintendent. After a hearing upon said exceptions, O'Malley was surcharged in the amount of \$85,264.44. The trial court thereupon entered a judgment against O'Malley and his surety, The Central Surety and Insurance Corporation. From that judgment two separate appeals were taken. Those appeals were consolidated in the Supreme Court of the State of Missouri, and the judgment reversed.

Petitioner's statement omits many pertinent facts and contains many conclusions not warranted by the facts in the record. While stating that the association in liquidation is "an association of individual subscribers to ex-

change indemnity on a reciprocal plan through a common attorney-in-fact, acting under the provisions and limitations of the power of attorney executed by the subscribers," petitioner omits the statement that the association in liquidation, besides being such an entity as described by petitioner, is an association of individual subscribers engaged through an attorney-in-fact *in issuing* as an insuring entity *standard fire insurance policies* to persons who were not subscribers or members of the association. It is admitted that such contracts would be binding on the subscribers (R. 155). The power of attorney, Appendix of petitioner's brief (Paragraph 14), recognizes that such policies were issued. Petitioner designates the holders of standard fire policies as "non-participating, non-assessable subscribers."

The statement by petitioner that the rights of subscribers, as well as other creditors and holders of standard fire policies, were governed only by the powers of attorney executed, is merely a conclusion and erroneous. The statement that the expenditures were made from "individual trust funds" of subscribers is unfounded. The expenditures were made from all of the assets of M. L. U., coming to O'Malley as Superintendent on November 12, 1936. The statement of petitioner infers that the surcharge was made for the period when O'Malley was *temporarily in charge*. It was not. The surcharge covered the period beginning November 12, 1936, and ending August 16, 1937, continuing through two phases of the litigation; first, that period beginning November 12, 1936, and ending April 1, 1937, when O'Malley was attempting to maintain the *status quo* of the exchange, though hampered by defendants in the state court action and by two bankruptcy suits;\* and through that period beginning April 1, 1937, and ending August 16, 1937,

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\**In re Manufacturing Lumbermen's Underwriters*, (D. C. Mo.) 18 F. Supp. 114; *In re Manufacturing Lumbermen's Underwriters*, (D. C. Mo.) 46 F. Supp. 343.

during which period the M. L. U. had been dissolved and all of its assets vested in O'Malley.

The statement that the trial court found "that, without notice or hearing to the subscribers, the respondent O'Malley, while in charge of the association, misspent over \$85,000 of moneys belonging to the subscribers" is erroneous. A reference to the record (pages 105-112) discloses no such finding by the trial court. The findings were:

(R. 105), that O'Malley was not authorized to rein-sure or rehabilitate M. L. U.;

(R. 106), that he expended the sums without any legal authority, that they were exorbitant, unreasonable and never approved by the Court, that the expenses were not necessary for the settlement of the business of M. L. U.;

(R. 107), that he was entitled to credit on his final accounting for all sums found to have been reasonable and necessary in the handling and settlement of the business of M. L. U.;

(R. 107), that he be surcharged for all sums un-reasonably spent and not necessary for the business of handling and settling the business of M. L. U. and

(R. 109), that the expenditure of the sum of \$85,264.44 was not necessary, lawful, or of benefit to the settlement of M. L. U. The first claim that there was no notice or hearing to the subscribers came on motion for rehearing filed in the Supreme Court of the State of Missouri.

## D.

### **STATUTES INVOLVED.**

The statutes involved are Secs. 6052 to 6069, in-clusive, R. S. Mo., 1939. They are set out in full hereafter in Appendix to this brief.

## E.

**QUESTIONS PRESENTED.**

While no questions are specifically brought forward in the petition under the heading "Questions Presented," petitioner, in his accompanying brief and in the petition under the heading entitled "Reasons for Allowance of Writ," raises two questions:

(1) Are Secs. 6052 to 6059, R. S. Mo., 1939, unconstitutional in that they deprive subscribers to a reciprocal exchange of their property without due process of law, in violation of Amendment XIV of the Amendments to the Constitution of the United States, by delegating power to the Superintendent to expend sums of the exchange necessary while in liquidation?

(2) Do Secs. 6052 to 6059, R. S. Mo., 1939, impair the obligation of contract of subscribers to a reciprocal exchange in violation of Section 10, Article I, Clause 1, Articles of the United States Constitution, by delegating the power of the Superintendent to expend sums necessary for the liquidation of the exchange?

## F.

**SUMMARY OF THE ARGUMENT.****POINT I.**

The petition does not conform to Rule 38, Paragraph 2, of this court, for the reason that the petition fails to contain a statement, particularly disclosing the basis upon which it is contended that this court has jurisdiction (Rule 12, Paragraph 1).

**POINT II.**

The petition does not contain "Questions Presented," therefore, no question is specifically brought forward by the petition for writ of certiorari which can or will be

considered by this Court. This Court will not consider a question not specifically brought forward by petition for the writ.

### POINT III.

Edward L. Scheufler, present Superintendent of the Insurance Department of the State of Missouri, a state officer, challenges the constitutionality of Secs. 6052 to 6059 of the Missouri Insurance Code in the light of the due process clause and in the light of the contract clause of the Federal Constitution (Petition p. 9). He cannot assert the constitutionality of these statutes to maintain his position in this Court and assail their constitutionality. His challenge to the constitutionality of the state statutes does not present a federal question, but is merely one of local law. He, as a state officer, has no personal interest in this litigation by which he may challenge the constitutionality of the acts involved.

### POINT IV.

The constitutional questions sought to be presented to this court are too indefinite, vague and uncertain, merely referring to "the due process clause" and "the contract clause" of the Federal Constitution.

### POINT V.

No substantial federal question is presented in this case.

(1) The question of the jurisdiction of this Court upon such frivolous attempts to raise constitutional questions has been foreclosed.

(2) The attempted constitutional questions were not timely raised. The contention was first made in motion for rehearing in the Supreme Court of the State of Missouri that the subscribers were deprived of their property without due process of law. Such question could have

been raised by the exceptions to O'Malley's report (R. 59, 67); by the amended petition of Vincent B. Coates, substitute attorney-in-fact (R. 28-38); by the exceptions to O'Malley's supplemental report (R. 90-97); by the stipulation limiting exceptions to O'Malley's final report (R. 99, 103).

(3) The contentions of petitioner have been foreclosed by final judgment of the trial court, rendered April 1, 1937, disposing of the "trust fund theory" regarding the assets of M. L. U.; such judgment is *res judicata* as to the petitioner.

(4) There was no federal question involved in the Supreme Court of Missouri; no federal question was decided; the opinion was founded upon adequate questions of local law; the opinion and judgment of the Supreme Court of Missouri to which certiorari is sought is a construction by the highest court of the state of the statutes of that state and is not reviewable by this court.

## G.

**ARGUMENT.****POINT I.**

**The petition does not conform to Paragraph 2 of Rule 38 of this Court, in that it fails to contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction as provided in Paragraph 1 of Rule 12 of this Court.**

The petition does not show, as required by Paragraph 1 of Rule 12, by a statement that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and does not cite cases to sustain the jurisdiction of this Court. It does not include a statement of the grounds upon which it is contended the questions involved are substantial; it does not specify the stage in the proceedings in the court of first instance or in an appellate court at which the federal questions sought to be reviewed were raised, the way in which they were passed upon by the court as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

This Court has repeatedly held that the provisions of this paragraph with appropriate record page references must be complied with when review of a state court judgment is sought by petition for certiorari, and has found that a failure to comply with these requirements will be sufficient reason for denying the petition. In *Furness Withy & Co. v. Yang-Tsze Insurance Assn.*, 242 U. S. 430, 61 L. Ed. 409, this Court stated (l. c. 434):

"Such petitions (for certiorari) go first to every member of the court for examination, and are then separately considered in conference. \* \* \* We are not aided by oral arguments and necessarily rely in an especial way upon petitions, replies and supporting

briefs. Unless these are carefully prepared, contain appropriate references to the record and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring our attention the rights of interested parties may be prejudiced and the court will be impeded in its efforts properly to dispose of the causes which constantly crowd its docket."

This insufficiency alone in the petition should require that it be dismissed.

## POINT II.

**No question is specifically brought forward by the petition for writ of certiorari which can or will be considered by this Court.**

The petition does not contain a paragraph as required by Rule 38, Paragraph 2, "The Questions Presented." The "Reasons for the Allowance of the Writ" contained in the petition, pages 9-11, and the "Summary of the Argument" in the supporting brief attempt to raise two questions. This Court, in *General Talking Pictures Corporation, v. Western Electric Co.*, 304 U. S. 175, 190, 82 L. Ed. 1273, 1282, held, l. c. 177-178:

Our consideration of the case will be limited to the questions specifically brought forward by the petition. \* \* \* A supporting brief may be included in the petition, but, whether so included or presented separately, it must be direct, concise and in conformity with Rules 26 and 27. A failure to comply with these requirements will be a sufficient reason for denying the petition. \* \* \* Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought. The specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decisions on the matter involved."

It is somewhat difficult to determine, even taking the petition and brief together, whether or not petitioner challenges the actual constitutionality of the act, the statutes themselves, or whether they will attempt to challenge the construction placed upon the statutes by the Supreme Court of Missouri. Petitioner asserts (petition p. 9) that he, as the superintendent of the Insurance Department of the State of Missouri, an official, challenges the constitutionality of Secs. 6052 to 6069 of the Missouri Insurance Code. This was not the petitioner's contention in motion for rehearing in the Supreme Court of Missouri. The petitioner there asserted that the construction placed upon these sections by the Court rendered them unconstitutional. There was no direct attack upon the statutes. It would seem that there is more emphasis upon the former. See *Dickinson Industrial Site, Inc., v. Percy Cowan*, 309 U. S. 382, 389, 84 L. Ed. 819, 825; *Gunning v. Cooley*, 281 U. S. 90, 98, 74 L. Ed. 720, 726; *Helvering v. Taylor*, 293 U. S. 507, 516, 79 L. Ed. 623, 630.

### POINT III.

**Edward L. Scheufler, present Superintendent of the Insurance Department of the State of Missouri, states (Petition p. 9) that he himself, as an official, challenges the constitutionality of Sections 6052 to 6059 of the Missouri Insurance Code, in the light of the due process clause and in the light of the contract clause of the Federal Constitution.**

It has been repeatedly held by this Court that a state officer who has no personal interest in the litigation can sustain no injury thereby, and has not such an interest as will entitle him to apply for writ of certiorari in this court on the ground of unconstitutionality of a state statute. *County Court of Braxton v. State of West Va. ex rel. Dillon*, 208 U. S. 192, 198, 52 L. Ed. 450, 452. There this Court said, l. c. 197:

"The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state

courts sustaining the act, and the interest must be of a personal, and not of an official nature."

Holding that the county court of Braxton County in a representative capacity had not such a personal interest as distinguished from an official interest as would entitle them to a review as to the state court's decision on the constitutionality of state statutes.

To the same effect is *Stewart v. City of K. C., Kansas*, 239 U. S. 14, 16, 60 L. Ed. 120, 121. This Court stated, l. c. 16:

"Constituted by the laws of the state, he had attempted to resist one of its laws. Whether he may do so is purely a local question."

See also *Smith v. State of Indiana*, 191 U. S. 138, 150, 48 L. Ed. 125, 127; *Caffrey v. Territory of Okla.*, 177 U. S. 346, 349, 44 L. Ed. 799, 801.

#### POINT IV.

The constitutionality questions sought to be presented to this Court are indefinite, vague and uncertain, do not particularly specify the particular section of the Constitution of the United States claimed to be violated; such questions were not properly presented to the state court in a manner which would enable the state court to pass upon the same, so that this court could review the state court's action therein.

*Harding v. People of the State of Ill.*, 196 U. S. 78, 88, 49 L. Ed. 394, 398.

*Capital City Dairy Co. v. Ohio, ex rel. Attorney General*, 183 U. S. 238, 249, 46 L. Ed. 171, 177.

#### POINT V.

**There is no substantial federal question presented to this Court.**

(1) The question of the jurisdiction of this Court upon attempts to raise constitutional questions

with regard to denial of due process and impairment of the obligation of contract by insolvency proceedings against an insolvent insurance company or other institution affected with the public interest, has been foreclosed by decisions of this Court. In *Neblett v. Carpenter*, 305 U. S. 297, 305, 83 L. Ed. 182, 189, concerning various questions raised regarding the constitutionality of a California act, providing for the liquidation of insurance companies, that all of the holdings concerned matters of state law and amounted, at most, to alleged erroneous constructions of the state statutes by its own court of last resort, the Court said, l. c. 302:

"Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions."

This Court will ordinarily adopt the construction of a state court upon its own statutes, where there is no evasion of a federal question by that court, *Driscoll v. Edison Light & Power Co.*, 307 U. S. 104, 124, 83 L. Ed. 1134, 1147, particularly where the construction of the statute placed upon it by the state court has been adopted by the state officials charged with the administration of the act. Here, O'Malley had placed upon the statutes authorizing him to take charge of an insolvent insurance company the same construction placed upon the statutes by the Supreme Court of the State of Missouri. See *Doty v. Love*, 295 U. S. 64, 74, 79 L. Ed. 1303, 1310. This Court has repeatedly held that the business of insurance is impressed with the public interest. *Equitable Life Assur. Society v. Brown*, 187 U. S. 308, 315, 47 L. Ed. 190, 193; *Relfe v. Rundle*, 103 U. S. 222, 226, 26 L. Ed. 337, 339.

In the *Relfe* case, the Missouri Insurance Code of 1879 was under consideration. It was held that the Superintendent of the Missouri Insurance Department was an officer of the state, representing the state in its sovereignty, while performing its public duties connected

with the winding up of its affairs with one of its insolvent and dissolved corporations; that his authority did not come from a decree of the court but from the statute. It was held that he represented all of the creditors, policyholders and persons interested, was entitled to hold and dispose of the property of the dissolved corporation in trust for the use and benefit of creditors and other parties interested. See also *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 434, 58 L. Ed. 1011, 1030.

(2) The attempted constitutional questions were not timely raised. The contentions were first made in motion for rehearing in the state supreme court that the subscribers were deprived of property without due process of law, and that the construction placed upon the statutes by the court rendered them unconstitutional. Such questions certainly were not raised at the earliest opportunity. They could have been raised by the exceptions to O'Malley's report (R. 59, 67), to his supplemental report (R. 90, 97), in the stipulation limiting the exceptions (R. 99, 103), and, while the "trust fund theory" was raised by the answer of Vincent B. Coates, substitute attorney-in-fact, who recited in the answer that he represented the subscribers (R. 28, 38), no constitutional question was raised. The decision of the court could have been anticipated and should have been anticipated by petitioner. While the rehabilitation section of the Insurance Code of Missouri perhaps had not been construed, similar sections in the Missouri Insurance Code had been repeatedly construed by the State Supreme Court, wherein that court had held that the insurance business, impressed with the public interest, was subject to strict regulation; that the administration of the Code was a duty of the Superintendent; and that the courts could not interfere with him in the administration of that Code. *State ex rel. Mo. State Life Ins. Co. v. Hall*, 330 Mo. 1107, 52 S. W. 2d 174; *State ex rel. St. Louis Mutual Life Ins. Co. v. Mulloy*, 330 Mo. 951, 52 S. W. 2d 469; *O'Malley v. Con-*

*tinental Life Ins. Co. et al.*, 343 Mo. 382, 121 S. W. 2d 834, l. c. 836; *State ex rel. Lucas v. Blair*, 346 Mo. 1017, 144 S. W. 2d 106; *State ex rel. Carwood Realty Co. v. Dinwiddie*, 343 Mo. 592, 122 S. W. 2d 912. By courts of other states: *Carpenter v. Pacific Mutual Ins. Co. of Calif.*, 74 Pac. 2d (Calif. 761); and by this court: *Relfe v. Rundle*, *supra*.

*In Herndon v. Georgia*, 295 U. S. 441, 455, 79 L. Ed. 1530, 1539, this Court stated the rule with regard to the time of raising federal questions in a state court, so as to confer appellate jurisdiction on this court, and, while stating that:

"There is no doubt that the federal claim was timely, if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it,"

that situation certainly does not obtain here. The only theory upon which the decision of the state court could not have been anticipated was upon the theory that the successor Superintendent excepting to O'Malley's report and accounting should prevail upon all issues upon the appeal. Further, there is no substance to the constitutional claims. The business of insurance being impressed with the public interest, the statutes providing for the regulation of insurance companies became a part of the charter of the exchange, *Carpenter v. Pacific Mutual Life*, 74 Pac. 2d l. c. 774, 775 (affirmed); *Neblett v. Carpenter*, 305 U. S. 297, 305, 83 L. Ed. 182, 189, wherein it was held that neither the company (here subscribers) nor policyholders have the inviolate rights that characterize private contracts. The contract of each policyholder is subject to the state's police power. In *Ellerbe, Supt. of Ins., v. United Masonic Benefit Association*, 114 Mo. 501, the Supreme Court of Missouri held that a liquidation statute was not a law impairing the obligation of a contract because of its making a different disposition of the insolvent company's assets than that provided for by the

certificates of insurance, since the law authorizing a company's existence became a part of its contracts and by such law the parties contracting with it agreed to be governed.

The subscribers to this exchange, executing their powers of attorney while statutory requirements were in effect regulating insurance companies, entered into an enterprise already regulated in the particular to which petitioner now objects. The subscribers executed the powers of attorney subject to further legislation upon the same topic. *Veix v. Sixth Ward Building & Loan Assn.*, 310 U. S. 32, 41, 84 L. Ed. 1061, 1067. The subscribers could not, by the execution of a power of attorney, divest the state of its right to assert its governmental authority in the exercise of its police power. *Penn. Hospital v. City of Philadelphia*, 245 U. S. 20, 24, 62 L. Ed. 124, 128. The subscribers were situated in the same position as any other creditor or policyholder, and were entitled, at most, to a ratable distribution of the assets after proper expenditures necessary to obtain liquidation. *Clark v. Williard*, 292 U. S. 112, 138, 78 L. Ed. 1160, 1175.

(3) Petitioner's theory advanced here that the assets of M. L. U. represented by the contributions of the subscribers became a trust fund for the subscribers was advanced by Vincent B. Coates, substitute attorney-in-fact *prior to* the decree of dissolution entered on April 1, 1937, asserting in his answer (Paragraph XI, XII, XIII, R. 31, 35) that any fact subscribers were entitled to a preference, that the assets of M. L. U. be subdivided to preserve the "trust fund." The court in its order of dissolution and injunction, entered on April 1, 1937, found against that contention and dissolved the association and enjoined the association, the attorney-in-fact and *the subscribers* from further engaging in business. A judgment as to this contention is *res judicata*. No appeal was taken and this matter could not be reasserted in a motion for rehearing in the state court or presented to this court.

(4) The decision of the state court in construction of its own statutes is a matter of local law and not federal law, and a mere erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Co. v. Kentucky*, 273 U. S. 269, 274, 71 L. Ed. 639, 642. The Constitution does not guarantee freedom from an erroneous decision of the state court. *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 300, 82 L. Ed. 268, 276. The decision of the Supreme Court of the State of Missouri is in full conformity with all of its prior decisions and with decisions of this Court.

### **Conclusion.**

Petition for certiorari should be denied for failure to comply with the rules of this Court; for the reason that no substantial federal question is properly before this Court; and for the reason that petitioner has no personal interest in the decision.

Respectfully submitted,

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